WORKERS COMPENSATION COMMISSION

STATEMENT OF REASONS FOR DECISION OF THE APPEAL PANEL IN RELATION TO A MEDICAL DISPUTE

Matter Number:	**M1-2712/19**
Appellant:	**St Kyros Cranes Pty Ltd**
Respondent:	**Hassen Haddad**
Date of Decision:	**28 February 2020**
Citation:	**[2020] NSWWCCMA 33**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Dr Julian Parmegiani**
Approved Medical Specialist:	**Dr Michael Hong**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 30 October 2019 St Kyros Cranes Pty Ltd, the appellant employer, lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Associate Professor Michael Robertson, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 9 October 2019.

2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):

    - the assessment was made on the basis of incorrect criteria,
    - the MAC contains a demonstrable error.

3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.

4. The WorkCover Medical Assessment Guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the WorkCover Medical Assessment Guidelines.

5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th* ed 1 April 2016 (the Guides) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5). "WPI" is reference to whole person impairment.

RELEVANT FACTUAL BACKGROUND

6. On 16 September 2019 the delegate of the Registrar issued an amended referral to the AMS for assessment of WPI caused by a psychiatric/psychological disorder which occurred on 8 December 2015.

7. The referral invited the AMS to refer to the Consent Orders made on 12 September 2019.

8. The Consent Orders contained the following memorandum[1]:

> "The following is not a determination of the Commission, however, I note that the parties have agreed:
>
> A. The AMS is to have regard to the provisions of section 65A of the 1987 Act.
> B. The existence of a secondary psychological injury is not accepted or conceded by the applicant."

9. On 8 December 2015 Mr Haddad, then aged 22 suffered an injury at a building site in Hunt Street, Parramatta. His right hand became jammed in a pallet when the hooks tightened suddenly and he suffered a traumatic amputation of the distal part of his right middle finger.

10. He was assessed with regard to impairment caused by that injury by an AMS on 23 July 2019 and a 9% WPI was given.

11. In the meantime, Mr Haddad's mental state deteriorated and he came under the care of Dr Teoh, who noted that Mr Haddad's psychiatric condition was a "primary diagnosis".

12. Mr Haddad's treating psychiatrist was Dr Mallick.

13. The AMS found there to be a 15% WPI assessment.

PRELIMINARY REVIEW

14. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the WorkCover Medical Assessment Guidelines.

15. The appellant employer requested that Mr Haddad be re-examined by a Panel AMS. For the reasons given below, the request is rejected.

EVIDENCE

Documentary evidence

16. The Appeal Panel has before it all the documents that were sent to the AMS for the original medical assessment and has taken them into account in making this determination.

Medical Assessment Certificate

17. The parts of the medical certificate given by the AMS that are relevant to the appeal are set out, where relevant, in the body of this decision.

SUBMISSIONS

18. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.

FINDINGS AND REASONS

19. The procedures on appeal are contained in s 328 of the 1998 Act. The appeal is to be by way of review of the original medical assessment but the review is limited to the grounds of appeal on which the appeal is made.

[1] Appeal papers page 36.

20. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons. Where there are disputes of fact it may be necessary to refer to evidence or other material on which findings are based, but the extent to which this is necessary will vary from case to case. Where more than one conclusion is open, it will be necessary to explain why one conclusion is preferred. On the other hand, the reasons need not be extensive or provide a detailed explanation of the criteria applied by the medical professionals in reaching a professional judgement.

21. The sole ground of appeal was as to the method used by the AMS to apportion impairment between a primary and secondary psychological injury.

22. However, a preliminary issue was raised by the Panel regarding whether either it or the AMS had jurisdiction to consider this referral.

Jurisdiction

23. On 9 January 2020 the Panel issued the following direction:

> "1. The Panel notes the terms of the Consent Order dated 12 September 2019, and in particular the notation thereto:
>
> 'The following is not a determination of the Commission, however, I note that the parties have agreed:
>
> A. The AMS is to have regard to the provisions of section 65A of the 1987 Act.
>
> B. The existence of a secondary psychological injury is not accepted or conceded by the applicant.'
>
> 2. The Panel further notes the terms of s 321A(2) of the 1998 Act, which provides:
>
> (2) Without limiting subsection (1), the regulations may provide that a medical dispute may not be referred for assessment under this Part if the dispute concerns permanent impairment of an injured worker where liability is in issue and has not been determined by the Commission.
>
> 3. The Panel invites the parties to address the question of jurisdiction in the light of the above. Submissions are to be lodged within 14 days of this direction."

24. Submissions were duly lodged.

25. The appellant employer responded to our direction by addressing point 2. It firstly submitted that no "relevant" jurisdictional issues arose. It then noted (accurately) that no regulations had been promulgated but asserted that "even if there were…there is no dispute where liability is concerned." It was submitted, again accurately, that there were no liability issues in which ss 4 or 9A of the *Workers Compensation Act 1987* (1987 Act) were implicated, and noted that the relevant issue pertained to whether the worker had suffered a primary or secondary psychological injury for the purposes of the assessment of WPI.

26. The appellant employer concluded that liability was therefore not in issue and s 321A had no application.

27. Mr Haddad submitted, respectfully, that s 321A(2) was immaterial and irrelevant. This was because, in the context of the wording of the section, no regulations had been promulgated. Mr Haddad submitted, accurately, that accordingly s 321A(2) could have no application.

28. Mr Haddad submitted, as did the appellant employer, that the "justiciable issue" was the extent of permanent impairment for the primary psychological injury, liability for which had been accepted.

29. Mr Haddad repeated the submissions he had already made in his appeal, but perhaps with greater clarity, that s 65A of the 1987 Act required the AMS to have no regard for any impairment or symptoms resulting from secondary psychological injury. This, it was submitted, the AMS did. We were advised that "put simply" no Regulation was engaged because none existed. In any event, even if the regulations had been promulgated, they would have been "irrelevant, extraneous and inapplicable to the application and/or the referral to the AMS."

30. It can be seen that both parties were ad idem, and insisted that the question of jurisdiction was not raised because liability was not in issue. However, the parties failed to address the invitation contained in point 3 of our direction.

31. Section 321A of the 1998 Act was introduced by Schedule 2.2 [5] of the *Workers Compensation Legislative Amendment Act 2018*, Act no 62, and repealed s 321 as it then was. The repealed s 321 was introduced by Act 113 of 2005. It provided relevantly:

> "(1) A medical dispute may be referred for assessment under this Part by a court, the Commission or the Registrar, either of their own motion or at the request of a party to the dispute…
> (2) …..
> (3) ….
> (4) The Registrar may not refer for assessment under this Part:
>
> (a) a medical dispute concerning permanent impairment… Of an injured worker where liability is an issue and has not been determined by the Commission
> (b) …:"

32. Section 321A was one of the amendments made following the repeal of s 65(3) of the 1987 Act. In *Etherton v ISS Property Services Pty Ltd*[2] from [102], President Judge Phillips explained the effect of that amendment:

> "102. Prior to the commencement of the amendments on 1 January 2019, s 65(3) of the 1987 Act provided as follows:
>
> > 'If there is a dispute about the degree of permanent impairment of an injured worker, the Commission may not award permanent impairment compensation unless the degree of permanent impairment has been assessed by an approved medical specialist.'
>
> 103. This provision was repealed with effect from 1 January 2019.
>
> 104. A new provision was inserted into the 1998 Act, s 322A(1A) which provides as follows:
>
> > 'A reference in subsection (1) to an assessment includes an assessment of the degree of permanent impairment made by the Commission in the course of the determination of a dispute about the degree of the impairment that is not the subject of a referral under this Part.'

[2] [2019] NSWWCCPD 53.

105. As can be seen, the relevant alteration is that prior to 1 January 2019 the Commission was prohibited, by virtue of the terms of s 65(3) of the 1987 Act, from awarding permanent impairment compensation absent an assessment by an Approved Medical Specialist. That prohibition was removed and the Commission was then empowered to determine such matters itself."

33. The resulting lacuna in the legislative policy, with the repeal of s 321 of the 1998 Act and there being at present no regulations to trigger the commencement of s 321A, was not considered by either party. Inasmuch as the issue was summarily dismissed by both parties, it seemed to be inferred that in the absence of any valid legislative enactment governing the referral of matters to an AMS, there was produced a legal vacuum, through which matters could pass to an AMS regardless of whether jurisdiction existed or not.

34. However, both parties misconceived the underlying purpose of our direction, which pertained to "the question of jurisdiction." If liability was in issue, then there was a clear legislative intention evinced by the terms of ss 321 and 321A that the resolution of that issue must be determined by the Commission, albeit that there is at present a lacuna. With respect to the summary and somewhat concise submissions of both parties on liability, we must, with respect, disagree. There is clear authority that issues arising pursuant to s 65A are indeed issues pertaining to liability.

35. In *State of NSW (Department of Education) v Kaur*[3] one of the issues decided by Campbell J was described in the Catchwords as:

> "ADMINISTRATIVE LAW – administrative tribunals – Medical Appeal Panel convened under workers compensation legislation – whether error of law to fail to classify psychological injury as secondary or primary – whether classification is a question for the Commission not approved medical specialist."

36. In answering the question in the affirmative His Honour referred to the plaintiff's submission that the Appeal Panel had erred by dismissing its argument that it had failed to consider whether the psychological condition in question was a secondary psychological injury in conformance with s 65A. He said:

> "13. The Appeal Panel rejected the Department's argument saying (at paragraphs 34 to 37):
>
> '34. The s 74 notice issued on 10 October 2012 denied liability, but on the basis that s 11A of the 1987 Act provided a complete defence; that is to say that although the claimant suffered a psychological/psychiatric injury, it was through reasonable action taken by the employer in respect of performance appraisal. Although the s 74 notice referred to the report of Dr Adam Martin (and to Dr Graham Vickery) the insurer did not deny the claimant's entitlement upon the basis that the claimant had suffered a secondary psychiatric injury.
>
> 35. The submission by the appellant employer that the above evidence raises a question of whether the psychiatric injury is primary or secondary is, with respect, misconceived. It is clear that Dr Martin was of the view that employment had not been a substantial contributing factor to the psychiatric injury. That would constitute a complete defence against this action. However, such a defence is a matter of legal entitlement that lies within the jurisdiction of the Commission.

[33] [2016] NSWSC 346 (*Kaur*).

36. It was not raised in the s 74 notice, and it was not raised in the Reply. It can be seen that the reasoning of Dr Martin that the claimant's employment was not a substantial contributing factor to occurrence of the injury included an opinion that part of the psychiatric injury was a secondary injury caused by her 'profound physical disability including obesity, orthopaedic problems and sleep apnoea.'

37. The question of whether an injury has caused a secondary or primary psychological condition in our view is one for the Commission to determine, as legal entitlement is at the root of the distinction. Thus this case involved a legal issue within section 65A of the 1987 Act (pertaining to primary and secondary psychological injuries) and the legal issue which the appellant employer elected not to contest pursuant to s 9A of the 1987 Act, that employment had not been a substantial contributing factor.'

14. The gravamen of the reasoning of the Appeal Panel in relation to that argument was that questions concerning the application of s 65A to a case were matters within the purview of the Workers Compensation Commission of NSW rather than part of a medical dispute within the exclusive jurisdiction of an approved medical specialist or, in due course, an appeal panel. Accordingly, the Panel rejected the Department's argument based upon the operation of s 65A."

37. Campbell J found at [22]:

"Given that I am of the view that the particular question of law does not arise, it perhaps is unnecessary for me to express any opinion about the correctness of the Appeal Panel's legal view. However, given the detailed argument that was addressed to me by counsel, and lest the matter go on appeal, I should point out that in my judgment, the question of whether an injury is a secondary or primary psychological injury is one for the Commission to determine and not one that arises as part of a medical dispute as defined by s 319 of the 1998 Act. In my opinion this follows from the judgment of the Court of Appeal in *Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd* [2014] NSWCA 264 at [109] – [111] by Emmett JA, with Meagher and Ward JJA agreeing. At [111] his Honour said:

'It is for the Commission to determine whether a worker has suffered an injury within the meaning of s 4 of the Compensation Act [1987 Act]. The Commission must always determine whether there are any disentitling provisions, such that compensation is not payable in respect of that injury. It is also the function of the Commission to determine by whom any compensation is payable. Jurisdiction is conferred on the Commission by s 105 of the Management Act [1998 Act]. However, that jurisdiction is subject to the restriction contained in s 65(3) in the Compensation Act [1987 Act], which precludes the Commission from awarding permanent impairment compensation if there is a dispute about the degree of impairment, unless the degree of impairment has been assessed by an approved medical specialist. The fact that the medical dispute includes a dispute as to the degree of permanent impairment of a worker as a result of an injury is consistent with the entitling provision of s 66 of the Compensation Act [1987 Act] in conferring an entitlement to receive compensation if the worker receives an injury **that results in** permanent impairment. The degree of permanent impairment that results from an injury is to be assessed as provided in Pt 7 of Ch 7 [of the 1998 Act' [Original emphasis]

Looking at the language of s 65A(1), as matter of construction, it is, to adopt Emmett JA's phrase, 'a disentitling provision'. This is made clear in my view by the language 'no compensation is payable' at the outset of s 65A (1). Similar language appears in s 9A and s 11A which are clearly recognised as 'disentitling provisions'. It is true that s 65A is not found in a division dealing with general liability to receive compensation, as s 9A and s 11A are. Nonetheless, the language of s 65A is concerned with substantive rights rather than questions of the process of the quantification of the entitlement to monetary compensation dealt with in the other provisions of Division 4 of part 3 of the 1987 Act."

38. We would add further that the dicta of the Court of Appeal in *Jaffarie v Quality Castings Pty Ltd* [4] are also germane to this question. At [80] White JA, McFarlan and Leeming JJA agreeing, said:

> "… Deputy President Roche in his judgment of 9 December 2014 (*Jaffarie v Quality Castings Pty Ltd* [2014] NSWWCCPD 79) analysed in detail the reasons of this Court in *Bindah* and concluded as follows:
>
> > '[249] Notwithstanding the different approach by Emmett JA and Meagher JA, it is my view that the following principles apply to proceedings in the Commission:
> >
> > (a) questions of causation are not foreign to medical disputes within the meaning of that term when used in the 1998 Act. Assessing the degree of permanent impairment "as a result of an injury", and whether any proportion of permanent impairment is "due" to any previous injury or pre-existing condition or abnormality, both call for a determination of a causal connection (*Bindah* at [110]);
> >
> > (b) it is for the Commission to determine whether a worker has received an injury within the meaning of s 4 of the 1987 Act and whether there are any disentitling provisions, such that compensation is not payable for that injury (*Bindah* at [111] and s 105 of the 1998 Act);
> >
> > (c) the Commission's jurisdiction is restricted by s 65(3) of the 1987 Act, which precludes the Commission (an Arbitrator or a Presidential member) from awarding permanent impairment compensation if there is a dispute about the degree of permanent impairment, unless the degree of impairment has been assessed by an AMS (*Bindah* at [111]);
> >
> > (d) the determination of the degree of permanent impairment that results from an injury is a matter wholly within the jurisdiction of the AMS or, on appeal, the Appeal Panel and is not a matter for determination by an Arbitrator (*Bindah* at [112]);
> >
> > (e) a finding made by a person without jurisdiction cannot bind a person or persons who have jurisdiction (*Haroun* at [16] and [19]–[21]), and
> >
> > (f) it is desirable to avoid drawing a rigid distinction between jurisdiction to decide issues of liability and jurisdiction to decide medical issues (*Bindah* at [110]; *Tolevski* at [35]).
> >
> > ...

[4] [2018] NSWCA 88

> [255] The only matters that are "conclusively presumed to be correct" are those matters listed in s 326(1). They are:
>
> "(a) the degree of permanent impairment of the worker as a result of an injury,
>
> (b) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality,
>
> (c) the nature and extent of loss of hearing suffered by a worker,
>
> (d) whether impairment is permanent,
>
> (e) whether the degree of permanent impairment is fully ascertainable."
>
> [256] It follows that, since "the nature of the injury" (or the "condition" or "aetiology of the condition") is not a matter on which an assessment in a MAC is conclusively presumed to be correct, the opinions of an AMS on such matters do not bind the Commission. This follows from s 326(2), which states that "[a]s to any other matter, the assessment certified is evidence (but not conclusive evidence) in any such proceedings". This conclusion is reinforced when one considers s 319(e), which defines medical dispute to include "the nature and extent of loss of hearing suffered by a worker", and s 326(c), which states that an assessment in a MAC is conclusively presumed to be correct as to "the nature and extent of loss of hearing suffered by a worker" (*McGowan v Secretary, Department of Education and Communities* [2014] NSWWCCPD 51 (*McGowan*)). In other words, if the injury is a loss, or further loss, of hearing an AMS determines the "injury" issue. That is an exception to the norm.
>
> [257] The absence of any similar provisions for "the nature of the injury" points strongly to the conclusion that "the nature of the injury" is a matter for the Commission to determine. This is consistent with Emmett JA's statement at [111] that it is for the Commission "to determine whether a worker has suffered an injury within the meaning of s 4 of the [1987] Act" and his Honour's later statement (at [118]) that only "certain matters of causation" (emphasis added) are within the exclusive jurisdiction of an AMS.'

In this Court's earlier reasons of 29 October 2015 no comment was made in relation to these reasons of Deputy President Roche. It is evident that no issue was raised in the earlier appeal about the correctness of those reasons. As the Senior Arbitrator and Acting President recognised on the redetermination of the matter, the Senior Arbitrator was obliged to determine what was the nature of the work-related injury suffered by Mr Jaffarie by reason of the order of this court of 29 October 2015 that required the matter to be re-determined in accordance with the Deputy President's judgment where that was not varied by the Court of Appeal. The Acting President made no error in so deciding."

39. Section 65A accordingly is a disentitling provision, concerned with the nature of the injury. It is for the Commission to determine whether a secondary psychological injury has resulted from a physical injury or primary psychological injury, applying the terms of the definition of a secondary psychological injury in compliance with s 65A(5). Thus it is for the Commission to determine whether a psychological injury has arisen as a consequence of, or secondary to, a physical injury. Objective expert evidence can of course be obtained from an AMS under the provisions of s 60(5) of the 1987 Act, but such evidence is not binding.

40. Mr Haddad in his submissions contended that a relevant distinction between this case and the facts in *Mercy Centre Lavington Limited v Kiely*[5] is that in that case the matter was referred to the AMS by the parties, who agreed that the worker had suffered both primary and secondary psychological injuries. In the present case, secondary psychiatric injury was denied by Mr Haddad.

41. On the authority of the above cases, such a distinction is irrelevant. Whether the parties agree that a secondary psychological injury was present or not, an AMS has only the limited jurisdiction to consider the question conferred pursuant to s 60(5) of the 1987 Act.

42. We note that although *Kaur* was decided in 2016, it was not cited in either of the *Kiely* Judicial Reviews before Wilson J in 2017, or Harrison AsJ in 2018. It may be that both decisions were therefore per incuriam, but such a finding is beyond the scope of these reasons.

43. As noted above, jurisdiction cannot be conferred by consent of the parties where none exists.

44. It follows that the matter must be referred back to the Registrar to be dealt with according to law.

45. In case we are incorrect in our conclusion, we turn to the arguments raised by the parties. It will be noted that our conclusion is that the MAC must be revoked in any event, and if we are wrong in our conclusion regarding jurisdiction then the matter can be remitted to us for the purposes of a re-examination of Mr Haddad.

The method adopted by the AMS – the issue raised by the appellant employer

46. The AMS, in considering the topic "social activities/ADL," said:[6]

> "**Social activities/ADL**:
> I have attempted to distinguish, where relevant, the contribution of Mr Haddad's physical pain and impaired hand function to any observed incapacity from his psychological distress in assessing Class of permanent impairment on each of the tables on the PIRS."

47. In his summary the AMS said[7]:

> "**summary of injuries and diagnoses:**
> Mr Haddad presents with an ongoing adjustment disorder with anxiety and depressed mood. There are some cross-cutting features of social anxiety disorder and PTSD, but neither of those syndromes are fully present.
>
> There appears to be a combined primary and secondary psychological injury as some of Mr Haddad's psychological distress arises from intermittent neuropathic pain, although the majority of cause of the observed impairment of his psychosocial functioning is attributable to the observed anxiety and depressive symptoms."

48. The AMS referred to the facts he regarded as relevant. He said:[8]

> **"THE FACTS ON WHICH THE ASSESSMENT IS BASED**
>
> The facts on which I have based my assessment of whole person impairment are:

[5] [2017] NSWSC 1234 (*Kiely*).
[6] Appeal papers page 28.
[7] Appeal papers page 29.
[8] Appeal papers page 31.

a) I have assessed where possible the specific effects of the primary psychological injury on Mr Haddad's impairment of psychosocial function

b) I have noted that he has significant symptoms of anxiety, particularly in the domain of interpersonal functioning, which is disrupting his work capacity – as evidenced in his recent job trial.

c) I note his capacity to work full time suitable duties from the perspective of his hand injury. I note his aspirations to work full-time in an alternative role, although his current study program of 15-20 hours per week and other productive activity is evidence of Class 3 impairment on Table 11.6."

49. In his Reasons for Assessment the AMS said[9]:

> "There is 15% whole person permanent impairment.
>
> In making that assessment I have taken account of the following matters:-
> I have sought to distinguish between the effects of primary and secondary psychological injuries on different domains of the PIRS."

50. We interpolate to note that the Psychiatric Impairment Rating Scale (PIRS) did not on its face make any allowance for an apportionment between secondary and primary psychological condition.

51. The AMS, in explaining his calculations, said:[10]

> "I have used the PIRS with the approach described above. Whilst the assessment is comparable to that of Dr Wotton, the arbitrary apportionment of 10% is not consistent with the guides."

52. The AMS considered the other medical opinions that were before him:[11]

> **"(c) my brief comments regarding the other medical opinions and findings submitted by the parties and, where applicable, the reasons why my opinion differs**
>
> The diagnosis of an adjustment disorder made by both Dr Teoh and Dr Wotton is appropriate in the clinical circumstances. I have commented on the methodology used to evaluate WPI. Dr Teoh takes the view that the entire WPI is attributable to a primary psychological injury I do not agree."

53. The PIRS Table was as follows:

PIRS Category	Class	Reason for Decision
Table 11.1 - Self-Care and Personal Hygiene	**1**	He showers regularly. He can prepare his own food despite some limitations with his hand function.
Table 11.2 - Social and Recreational Activities	**3**	He keeps company only with a few close friends, out of concerns arising from excessive scrutiny of his injured hand He will go out with his 'mates' once per fortnight. He will avoid going to parties or unfamiliar circumstances due to phobic anxiety.

[9] Appeal papers page 31.
[10] Appeal papers page 31.
[11] Appeal papers page 31.

Table 11.3 - Travel	**2**	He describes unrestricted capacity for travel. He is anxious on public transport, again due to the issue of excessive scrutiny of his injured hand and fear that he may be "clumsy" or drop things
Table 11.4 - Social Functioning	**3**	A relationship of long duration ended in the course of his psychological difficulties. He has also moved away from his family because he feared he was "toxic to people".
Table 11.5 - Concentration, Persistence and Pace	**3**	He describes impaired concentration and short-term memory. He is forgetful. He often repeats himself in conversations. On several occasions has locked himself out of his home and regularly misplaces his phone and his keys. He often loses focus after reading about half a page. He performed poorly on cognitive assessment
Table 11.6 - Employability	**3**	Mr Haddad was unable to sustain a job trial at Woolworths due to the extent of his interpersonal sensitivity and anxiety at the time interfering with his work performance. While he seeks, ultimately, to return to work in a full-time capacity in a different role outside of the building sector he is not capable of this work and his study program indicates he is only capable of working around 20 hours per week. Dr Keller's IMC noted no barriers to return to work based on his physical injuries.

List classes in ascending order:

1	2	3	3	3	3

Median Class Value: Aggregate Score:

3	15

Whole Person Impairment:

15%

Submissions

Appellant employer

54. The appellant employer submitted that the AMS had failed to apply the two-step process of assessment as outlined in *Kiely*[12]. This required in cases involving s 65A of the 1987 Act, that the AMS apply the Tables in the PIRS[13] in order to assess both the total WPI, and that caused by the secondary psychological injury. The resulting figure was the WPI caused by the primary psychological injury pursuant.

55. The appellant employer referred to the evidence before the AMS as to the psychological sequelae of the physical injury of 8 December 2015. It referred to the report of its medico-legal referee Dr Robert Wotton, Psychiatrist. At page 8 of his report of 6 December 2018[14], his opinion was:

[12] [2018] NSWSC 1421 (*Kiely*). The appellant employer erroneously gave the citation for the first instance decision.
[13] See Chapter 11 of the Guides at pages 56/57.
[14] Appeal papers page 176.

"A. [Mr Haddad] has developed emotional symptoms (anxiety, depression and anger) in response to an identifiable stressor (losing the terminal part of his right middle finger in a work-place accident), occurring within two months of the onset of the stressor."

56. We were also referred to page 9 of Dr Wotton's report:[15]

> "He is increasingly preoccupied by negative thoughts about his future and has lost confidence and self-esteem because of his physical injury. He is becoming socially isolated.
>
> These are secondary psychological injuries arising out of the subject accident."[16]

57. The appellant employer submitted that, accepting that some regard might have been given by the AMS to the implications of s 65A, the description of the categories within the PIRS Table of the MAC demonstrated that the AMS had included secondary psychiatric injury as part of his assessment. As an example, the inclusion of a reference under the "travel" category of Mr Haddad's anxiety on public transport out of concern that his injured hand might be the subject of excessive scrutiny, and that he may be clumsy or drop things, were indications that the AMS had failed to make the necessary apportionment.

58. The appellant employer submitted that it would be inappropriate for the matters to be dealt with on the papers "given the difficulty in ascertaining what impairment identified by the AMS results from primary vs secondary psychological injury".

Mr Haddad

59. Mr Haddad referred us to the report of his medico-legal referee Dr Ben Teoh, Consultant Psychiatrist. In his report of 25 August 2018 Dr Teoh found that the psychiatric condition was "a primary diagnosis, he had suffered psychological trauma at the time of the accident"[17].

60. The full context of that opinion followed a question from Mr Haddad's solicitors:

> "**5. Do you causally relate our client's injuries and disabilities to the accident at work?**
>
> His condition is caused by the injury, as a result of the psychological trauma and subsequent physical and mental condition.
>
> His psychiatric condition is a primary diagnosis, he had suffered psychological trauma at the time of his accident."

61. Mr Haddad submitted that it was "fortifying" to know that the PIRS assessment for each category assessed by Dr Teoh was mirrored by the PIRS assessed by the AMS.

62. Mr Haddad said:

> "The AMS provided somewhat more sophisticated complex and detailed reasoning for his decision however read broadly, the reasoning appears, for all practical purposes, identical".

63. Mr Haddad submitted that Dr Wotton also originally found that Mr Haddad had suffered a primary psychological injury. The appellant employer's solicitors made the following enquiry of Dr Wotton[18]:

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[15] Appeal papers page 177.
[16] Appeal papers page 31 [10b].
[17] Appeal papers page 59.
[18] Appeal papers page 177.

"4. Do you consider that the applicant has sustained a primary psychological injury arising out of the subject accident?

Mr Haddad was well and happy prior to the accident. He had left a toxic relationship and was enjoying living alone. He enjoyed his work. He liked working out at the gym and had an active social life. He enjoyed the company of his friends and family. He had no prior history of psychological or psychiatric disturbance.

Following the injury, he became significantly sad, depressed, withdrawn and angry. Following consultation with a psychiatrist, he was prescribed an antidepressant medication.

No other factors emerged at interview which could account for his diagnosed psychiatric illness.

Mr Haddad has sustained a primary psychological injury arising out of the subject accident."

64. Mr Haddad noted that Dr Wotton having made an assessment of 15% WPI (as did the AMS), then considered the following question[19]:

"11. Section 65A of the 1987 Act provides that no compensation is payable in respect of permanent impairment that results from a secondary psychological injury. Please apportion the extent, if any, of impairment, which relates to secondary psychological injury.

The impairment that Mr Haddad has suffered is in the main from his primary injury. There have been secondary consequences arising from facing an uncertain future which are also of a depressing nature.

I am unable to be precise in these matters. I would think that the greater proportion (say 90%) of the impairment results from the primary injury."

65. Mr Haddad submitted that Dr Wotton's reasons appeared to be, firstly that he was asked to apportion all, and secondly that the secondary consequence from the injury was the "uncertain future". This consequence did not find its way into Dr Wotton's PIRS Table. Under the Guidelines Mr Haddad submitted, no adjustment was therefore required or necessary under the Guidelines - indeed it would have been an error for such an apportionment to have been made.

66. Mr Haddad noted that Dr Wotton thereafter made such a deduction, finding an entitlement of 14% WPI.

67. Mr Haddad submitted that in doing so Dr Wotton fell into error.

68. We were referred to s 65A (2) of the 1987 Act. Mr Haddad submitted that the legislature was quite clear that a secondary psychological injury is to be disregarded in assessing the degree of permanent impairment. Mr Haddad said:

"The legislation does not permit for a construction of assessing the degree of permanent impairment to include the secondary psychological injury and then for some form of apportionment to occur."

[19] Appeal papers page 180.

69. This conclusion, it was submitted, was supported by the provisions of Chapter 1.22 of the Guides.

70. Mr Haddad submitted that Dr Wotton may have overlooked the definition of "secondary psychological injury" within s 65A. Dr Wotton's answers consequently were of no probative value as the questions that he was asked were wrong.

71. Mr Haddad then referred to the diagnosis given by the AMS, that there were some "cross-cutting features" of social anxiety disorder and Post Traumatic Stress Disorder, but they were not "fully present."

72. It was accordingly important to note, Mr Haddad submitted, that the AMS assessed "where possible" the specific effect of the primary psychological injury at paragraph 9 and paragraph 10 of the MAC.

73. Mr Haddad submitted that the approach of the "learned" AMS was "impeccable" and "cannot be criticised."

74. Mr Haddad then considered the principles in *Kiely*, and sought to distinguish the decision of AsJ Harrison on its facts.

75. The first point of distinction was said to be that the Consent Orders which caused the referral to be made contained an admission by the worker that he suffered from a secondary psychological condition. We interpolate to note, as we have indicated, that no such concession was made in the present case.

76. The second distinguishing factor was said to be that the passage relied upon by the appellant employer as to the method to be applied where an AMS had to apply s 65A of the 1987 Act was obiter dicta. Mr Haddad said that at law once a Court states that further reasoning was not necessary or essential to its decision, whilst it may be "interesting or instructive" it was not a "decision in law."

77. It was submitted that it was thus clear that the secondary injury was not required to be quantified and "it is certainly not the case that the secondary psychological injury needs to be 'apportioned'". It was submitted "the terms of the Consent Order were carefully considered by the parties" and agreed upon in order to avoid the "tying of the hands" as occurred in *Kiely.*

Discussion

78. As we have found, we are satisfied that neither the AMS nor the Appeal Panel has jurisdiction to hear this case.

79. However, in case we are incorrect, we make the following determination.

Legislation

80. Section 65A of the 1987 Act provides:

> **"65A Special provisions for psychological and psychiatric injury**
>
> (1) No compensation is payable under this Division in respect of permanent impairment that results from a secondary psychological injury.
>
> (2) In assessing the degree of permanent impairment that results from a physical injury or primary psychological injury, no regard is to be had to any impairment or symptoms resulting from a secondary psychological injury.

(3) No compensation is payable under this Division in respect of permanent impairment that results from a primary psychological injury unless the degree of permanent impairment resulting from the primary psychological injury is at least 15%. If more than one psychological injury arises out of the same incident, section 322 of the 1998 Act requires the injuries to be assessed together as one injury to determine the degree of permanent impairment.

(4) If a worker receives a primary psychological injury and a physical injury, arising out of the same incident, the worker is only entitled to receive compensation under this Division in respect of impairment resulting from one of those injuries, and for that purpose the following provisions apply:

(a) the degree of permanent impairment that results from the primary psychological injury is to be assessed separately from the degree of permanent impairment that results from the physical injury (despite section 65 (2)),

(b) the worker is entitled to receive compensation under this Division for impairment resulting from whichever injury results in the greater amount of compensation being payable to the worker under this Division (and is not entitled to receive compensation under this Division for impairment resulting from the other injury),

(c) the question of which injury results in the greater amount of compensation is, in default of agreement, to be determined by the Commission.

If there is more than one physical injury those injuries will still be assessed together as one injury under section 322 of the 1998 Act, but separately from any psychological injury. Similarly, if there is more than one psychological injury those psychological injures will be assessed together as one injury, but separately from any physical injury.

(5) In this section: "primary psychological injury" means a psychological injury that is not a secondary psychological injury. "psychological injury" includes psychiatric injury. "secondary psychological injury" means a psychological injury to the extent that it arises as a consequence of, or secondary to, a physical injury.

81. Section 327 and 328 provide the statutory jurisdiction of a Medical Appeal Panel. Section 327 provides relevantly:

“327 APPEAL AGAINST MEDICAL ASSESSMENT

(1) A party to a medical dispute may appeal against a medical assessment under this Part, but only in respect of a matter that is appealable under this section and only on the grounds for appeal under this section.

(2) A matter is appealable under this section if it is a matter as to which the assessment of an approved medical specialist certified in a medical assessment certificate under this Part is conclusively presumed to be correct in proceedings before a court or the Commission.

(3) The grounds for appeal under this section are any of the following grounds--

(a) deterioration of the worker's condition that results in an increase in the degree of permanent impairment,

(b) availability of additional relevant information (but only if the additional information was not available to, and could not reasonably have been obtained by, the appellant before the medical assessment appealed against),

(c) the assessment was made on the basis of incorrect criteria,

(d) the medical assessment certificate contains a demonstrable error.

(4) An appeal is to be made by application to the Registrar. The appeal is not to proceed unless the Registrar is satisfied that, on the face of the application and any submissions made to the Registrar, at least one of the grounds for appeal specified in subsection (3) has been made out.

(5) …

(6) …"

82. Section 328 provides:

"328 PROCEDURE ON APPEAL

(1) An appeal against a medical assessment is to be heard by an Appeal Panel constituted by 2 approved medical specialists and 1 Arbitrator, chosen by the Registrar.

(2) The appeal is to be by way of review of the original medical assessment but the review is limited to the grounds of appeal on which the appeal is made. The Workers Compensation Guidelines can provide for the procedure on an appeal.

(3) …

(4) …

(5) The Appeal Panel may confirm the certificate of assessment given in connection with the medical assessment appealed against, or may revoke that certificate and issue a new certificate as to the matters concerned. Section 326 applies to any such new certificate.

(6) The decision of a majority of the members of an Appeal Panel is the decision of the Appeal Panel."

83. Section 354 of the 1998 Act provides relevantly:

"**354 PROCEDURE BEFORE COMMISSION**

(1) Proceedings in any matter before the Commission are to be conducted with as little formality and technicality as the proper consideration of the matter permits.

(2) The Commission is not bound by the rules of evidence but may inform itself on any matter in such manner as the Commission thinks appropriate and as the proper consideration of the matter before the Commission permits.

(3) The Commission is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

(4) …
(5) …
(7) …
(7A) …
(8) …"

Guidelines

84. Chapters 1.21 and 1.22 of the Guides provide as follows:

> **"Psychiatric and psychological injuries**
>
> 1.21 Psychiatric and psychological injuries in the NSW workers compensation system are defined as primary psychological and psychiatric injuries in which work was found to be a substantial contributing factor.
>
> 1.22 A primary psychiatric condition is distinguished from a secondary psychiatric or psychological condition, which arises as a consequence of, or secondary to, another work related condition (eg depression associated with a back injury). No permanent impairment assessment is to be made of secondary psychiatric and psychological impairments. As referenced in paragraph 1.19, impairments arising from primary psychological and psychiatric injuries are to be assessed separately from the degree of impairment that results from physical injuries arising out of the same incident. The results of the two assessments cannot be combined."

85. Chapters 11.11 and 11.12 provide:

> "11.11 Behavioural consequences of psychiatric disorder are assessed on six scales, each of which evaluates an area of functional impairment:
>
> 1. Self-care and personal hygiene (Table 11.1)
> 2. Social and recreational activities (Table 11.2)
> 3. Travel (Table 11.3)
> 4. Social functioning (relationships) (Table 11.4)
> 5. Concentration, persistence and pace (Table 11.5)
> 6. Employability (Table 11.6).
>
> 11.12 Impairment in each area is rated using class descriptors. Classes range from 1 to 5, in accordance with severity. The standard form must be used when scoring the PIRS. The examples of activities are examples only. The assessing psychiatrist should take account of the person's cultural background. Consider activities that are usual for the person's age, sex and cultural norms."

Mercy Centre Lavington Limited v Kiely

86. There were in fact two Judicial Reviews, the first being reported as *Mercy Centre Lavington Limited v Kiely* [2017] NSWSC 1234, before Wilson J. In that review the Medical Appeal Panel's determination was set aside and the matter remitted for the consideration of a second Panel. The Panel had erroneously applied the provisions of s 323 of the 1998 Act.

87. In *Kiely*, Harrison AsJ set aside the determination of the second Medical Appeal Panel. It had failed to address the grounds of appeal that were before the first Panel, and a member of the Panel, Dr Parmegiani, had re-examined the worker when no demonstrable error had been found. Further, the second Panel had considered the quantification of the impairment caused by the secondary psychological injury, when it had not been raised by the parties as an issue.

88. There were further grounds of appeal, which Her Honour addressed at [88].

89. At [88] Harrison AsJ said:

> **"Grounds 4 and 5 - Failure to consider secondary psychological injury and adoption of 19% WPI**
>
> 88. Grounds 4 and 5 of the judicial review raise similar issues. While it is not necessary for me to decide these grounds of review, I will make some observations because they raise significant issues.
>
> 89. Ground 4 of this judicial review is perhaps the more significant one. It concerns the alleged failure of the Appeal Panel to consider secondary psychological injury.
>
> 90. Ground 5 concerns the Appeal Panel having erred by considering and revising the WPI of Ms Kiely." (Emphasis added).

90. At [94] Harrison AsJ noted that grounds 4 and 5 appeared to be contradictory, in that it was claimed that the Panel had failed to consider secondary psychological injury, whilst it also claimed that the Panel had done so by revising the applicable impairment. Nonetheless, Her Honour said that, having already found error, it was not necessary to reconcile these conflicting stances. She did, however, then proceed to consider the appropriate method an Appeal Panel should adopt when considering a s 65A assessment. These are the "significant issues" to which we apprehend her Honour was referring to. From [95], her Honour said:

> ~~95.~~ "95. For convenience, s 65A of the *Workers Compensation Act* (which I have set out earlier in this judgment) requires a distinction to be drawn between primary psychological injury and secondary psychological injury. Under s 65A(1), no compensation is payable for permanent impairment that results from a secondary psychological injury. When an AMS (or Appeal Panel) assesses the degree of permanent impairment resulting from a primary psychological injury, no regard can be had to any impairment or symptoms resulting from a secondary psychological injury in accordance s 65A(2).
>
> ~~96.~~ 96.The statutory scheme comprising of the *WIM Act* and the *Workers Compensation Act* creates a two-step approach in assessing the degree of WPI for a psychological injury. The assessor must first calculate the entire degree of psychological injury in line with the PIRS categories. The secondary psychological injury must then be assessed and deducted in accordance with s 65A of the *Workers Compensation Act*, leaving the primary psychological injury remaining.
>
> ~~97.~~ 97.This two-step process accords with the referral of the Workers Compensation Commission on 24 October 2016. This referral provided for the AMS to assess the degree of WPI arising out of the primary psychological injury sustained by Ms Kiely as a result of the incident, excluding 'any impairment or symptoms arising from or attributable to, the secondary psychological condition'."

91. At [100] Harrison AsJ said:

> "Putting aside the fact that the Appeal Panel incorrectly conducted a re-examination without first identifying an error, together with the parties having agreed that the AMS's initial assessments were correct in their written submissions, the Appeal Panel was not obliged to consider the quantification of secondary psychological injury as this issue was not raised on appeal. Nor was the Appeal Panel obliged to revise the WPI when this was not raised as a ground of appeal. Had it been necessary for me to express a view (which it is not) I would have determined the Appeal Panel had misconstrued its statutory task on both these grounds."

92. We concur that a distinction between this case and the facts in *Kiely* is that the matter was referred to the AMS by the parties, who agreed that the worker had suffered both primary and secondary psychological injuries. In the present case, secondary psychiatric injury was denied by Mr Haddad.

93. However it is not relevant as an issue that has any bearing on whether the method described by Harrison AsJ at [95-97] is applicable.

94. We do not agree that Her Honour's dicta may be ignored by an inferior jurisdiction such as that conferred on an Appeal Panel by virtue of s 327 and 328 of the 1998 Act. We make no determination as to whether Her Honour's impugned comments are obiter dicta or not. Suffice it to say that when a superior Court describes an issue that was before it as "significant", and when that Court then discusses the issue in question, whether it be technically obiter dicta or ratio decidendi, it is the type of issue that s 354 of the 1998 Act is designed to overcome. If it were to be found obiter dicta, it is very strong and persuasive, and should not be ignored without good reason.

95. We were referred in this context to a decision of another Medical Appeal Panel, *Secretary, Department of Industry v Lucia Nesci*.[20]

96. We decline to follow *Nesci*. The Panel in that case held that Her Honour's above comments were obiter and not binding, as the method she described was "one method that an AMS might adopt" to comply with s 65A, but that as long as the AMS "abides" by? the requirements of s 65A(2), he will have discharged his task. We had some difficulty, with respect, in divining the manner in which the AMS was said to have "abided" those requirements. Moreover, her Honour did not indicate that her remarks were intended to indicate one of many methods for calculation.

97. With respect, the approach of the Appeal Panel in *Nesci* rather ignores the provisions of s 65A(1), which states unequivocally that "no compensation is payable" for impairment arising from a secondary psychological injury. Section 65A(2), taken out of context, could be read as an injunction to make no deduction at all for impairment caused by secondary psychological injury, notwithstanding the terms of s 65A(1). Indeed, that submission was more clearly made in Mr Haddad's written submissions in answer to our Direction, as we have indicated above.

98. Accordingly we would have found that the method used by the AMS to assess the impairment pursuant to s 65A was incorrect.

99. Whilst the AMS acknowledged that he sought to distinguish between the effects of primary and secondary psychological injuries in the PIRS Table, he gave no indication of how he proposed to do so.

[20] [2019] NSW WCC MA 172 (*Nesci*).

100. A perusal of the PIRS Table itself is confusing and unclear. As was argued by the appellant employer, the inclusion of Mr Haddad's anxiety when travelling in public for fear of excessive scrutiny of his injury might be a secondary injury. Within the statutory definition, that anxiety would seem to be a secondary, or consequential, injury to the physical injury. Similarly Mr Haddad's fear that he might drop things is a consequence of and secondary to the physical injury.

101. Moreover, Mr Haddad's moving away from his family because he thought he was toxic to people could also be seen as a symptom of a secondary psychological injury. Further, his forgetfulness and loss of focus might also be seen as secondary to the physical injury.

102. There is a duty on an AMS to give adequate reasons for his conclusions, as we noted at the outset of these reasons. A minimum standard is that the parties and an appellate tribunal can understand the path of reasoning by which the AMS has reached his assessment. The mere acknowledgement of his task without any explanation of how that task was performed is inadequate. When the AMS said that he had taken account of the effects of the primary and secondary psychological injuries, he gave no adequate indication of how he had done so.

103. For these reasons, the Appeal Panel has determined that the matter be remitted to the Registrar to be dealt with according to law. Neither the AMS nor this Panel has jurisdiction to consider the matters referred on 16 September 2019.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

T Ng

Tina Ng
Dispute Services Officer
As delegate of the Registrar